No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Petitioner*,

v.

FIRST NATIONAL CITY BANK, *Respondent*,

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and FIRST NATIONAL CITY TRUST CO., *Defendants*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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May 1964

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OCTOBER TERM, 1963

No. 998

UNITED STATES OF AMERICA, *Petitioner*,

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FIRST NATIONAL CITY BANK, *Respondent*,

—and—

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and FIRST NATIONAL CITY TRUST CO., *Defendants*.

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Opinions Below

The opinion of the district court is reported at 210 F. Supp. 773. The opinion of the court of appeals for the second circuit, and the dissenting opinion (App. A of Petition) are reported at 321 F.2d 14. The *per curiam* opinion of the court of appeals (App. B of Petition) on the *en banc* rehearing is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Should this Court review the finding of the court of appeals that the power of a district court over the head office management of an American bank did not justify the court in requiring that bank to take action in a foreign country with respect to property of another, there situated, which was beyond the jurisdiction of both the Internal Revenue Service and the court itself?

Statutes Involved

The pertinent statutes are set forth in Appendix D to the Petition.

Statement

The Petition sets forth a grievance: that the Government has been denied its desires. It does not show that this denial was the result of an error. In essence, the Petition sets forth a claim by the Government that it requires certain powers and that its administrative function is handicapped by the refusal of the district court to indulge its desire for these new powers. No real contention is made that the administration has been deprived of a power previously exercised or lawfully enjoyed. Indeed, the Government conceded in open court that the powers it seeks are novel.

In consequence, the Petition is in effect a legislative memorandum, rather than an assignment of judicial error. As such it fails to meet the requirements of this Court.

ARGUMENT

I

There is No Credible Contention That the Decision of the Court of Appeals was Erroneous in Law.

The Petition makes three assertions as grounds for issuance of the writ. The first of these is that the decision of the court of appeals "severely hampers the Internal Revenue Service in its expanding efforts" to collect amounts allegedly due to it from nonresident aliens and American citizens residing abroad. This is a request for expanded powers and not an assignment of error. So far as it is an argument of policy it is, we submit, unsound and reference to the Petition itself demonstrates its inaccuracy. (Cf. *infra* § II pp. 4 to 5).

The second assertion is equally devoid of merit. It is a hypothetical argument that the Government *might* be able to secure a judgment against the taxpayer (Omar) upon the further hypothetical premise that it *might*, at some future date, be able to secure personal jurisdiction of Omar. Again, there is no serious suggestion that the decision of the court below was erroneous in the context of the record before it; the allegation is that the court might have been able to formulate a new rule of law helpful to the Government, albeit disastrous for innocent third parties.

The third assertion is that the court below might have been able to indulge the Government by disregarding the issue which the court of appeals, in its judicial discretion and responsibility, accurately found to be determinative.

In summary, therefore, the grievance of the Government is not that the court below erroneously stated the law,[1] but rather that the court below failed to exercise sufficient ingenuity to find a way around the law which would justify the Government's efforts to arrogate to itself non-existent

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[1] The decision of the court of appeals has received favorable comment in legal periodicals. 64 Colum. L. Rev. 774 (1964); 62 Mich. L. Rev. 1084 (1964).

powers, the exercise of which would irreparably and unjustifiably damage the foreign banking system of the United States.

II

The Petition Itself Discloses Lack of Jurisdiction in This Court.

As indicated above, the gravamen of the Petitioner's complaint is that it is denied an administrative power which it greatly desires, rather than that it has been deprived of an existing right through misapprehension or misapplication of the law. In consequence, the Petition is addressed to jursidiction which this Court does not have. It is a legislative rather than a judicial appeal.

Beyond this, the Petition sufficiently discloses that there is no objective policy reason for acceding to the demands of the Government.

The complaint is that the reasoned decision of the court of appeals "severely hampers the Internal Revenue Service in its expanding efforts to collect" (page 7) presently undetermined, but "predictable" tax liabilities in addition to "some $2,140,000 [which] *may* be on deposit in respondent's foreign branches" (page 9; emphasis and material in brackets added). At the same time, at page 19 of the Petition, the Government says "the Treasury Department plans to limit the institution of these enforcement suits to those cases in which the Internal Revenue Service has reason to believe that a taxpayer beyond the jurisdiction of the United States courts has been transferring funds out of the country to a foreign office in order to hinder or delay tax collection. [footnoted] The Treasury Department also proposes to limit the authority to levy to such a situation".

It does appear that, whether as a matter of policy or of law, the Government has recognized the undesirability of attempting to make good the boast often asserted in the courts below that a tax lien is global in its scope, and

extra-territorial in its application to property in foreign countries. The court of appeals found that the tax lien did not apply to accounts with a situs outside the United States; it is hard to understand, therefore, how the Government, now formally abandoning assertion of extra-territorial rights, can hope for credence in its contention that the decision of the court of appeals "severely hampers its activities".

Since the decision of the court of appeals, we have been advised that on the day the legal papers were served in New York, Omar, the allegedly delinquent taxpayer, had no property whatsoever at any of the foreign branches of the Respondent, except for an inconsequential amount at the Montevideo, Uruguay, branch and that Omar (which is contesting the validity of the assessment in the Tax Court) has now voluntarily placed this amount within the jurisdiction of the district court.[2]

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[2] A letter dated May 8, 1964 to Respondent from counsel for Omar is annexed hereto as Appendix A. It appears that copies of that letter have been sent to the Solicitor General and the Clerk of the Court. The substance of that letter is that on the day the legal papers were served in New York, October 31, 1962, the Montevideo, Uruguay, branch of the bank held for the account of Omar dollars and Uruguayan pesos equivalent to the sum of U. S. $2,052.88; that no other funds were then, or since, held by Respondent for Omar outside of the United States; and that Omar has directed the Montevideo branch of the bank to remit that sum to the New York office of the bank to be held in New York for the account of Omar.

Our client has advised us that on May 7, 1964 it in fact received in New York, from the Montevideo branch, $2,052.88 to be held for the account of Omar.

It will be noted that the only relief sought against Respondent by the Complaint is to "compel . . . [Respondent] . . . to return all property of defendant-taxpayer, Omar, S.A., to the jurisdiction of this Court for disposition and application consistent with the interests of plaintiff and for enforcement of plaintiff's lien on said property and rights to property; . . ." (Appendix to Appellant's Brief before Court of Appeals, p. 16a)

We feel that it is our obligation to bring these facts to the attention of the Court, since they raise the question of whether the case is moot. *Taylor* v. *McElroy*, 360 U. S. 709 (1959); *United States* v. *Alaska S.S. Co.*, 253 U. S. 113 (1920).

Aside from the question whether the action of the alleged taxpayer has rendered the action and, therefore, this appeal, moot, it is evident that the suggestion in the Petition of the amounts involved, and thus of the importance to the Government, appears to be contrary to the fact.

III

The Petition Itself Discloses That Reversal of the Decision Below Would do Irreparable Damage to the Respondent.

At the very outset, the Respondent pointed out that it would be subjected to multiple liability if it endeavored to comply with the order of the district court. This contention was belittled, if not specifically challenged, in the Government's Petition for Rehearing after rendition of the opinion below. Upon rehearing, the Respondent submitted opinions of counsel in 6 countries which confirmed the threat of multiple liability.

The Government has paid lip service to equity by saying that *if* compliance with the order "were shown to violate foreign law, the injunction would be modified" (Petition, p. 6) and from this concession it concludes that the injunction is not "unfair to respondent in any respect". The Government's concession has never gone beyond recognition that the Respondent should not be expected to violate the criminal law of another country; it has, indeed, suggested that to incur civil liability may not be a defense. In any event, it is clear that once liability for conversion or breach of a money contract has occurred, a modification of the order could not relieve the Respondent from the consequences of its conduct in the foreign country. In the face of this undeniable exposure to multiple liability and the evident inability of the district court to protect its order, the Petition is revealed as insufficient.

It is no answer to say that Respondent "might" be held entitled to reimbursement from the United States (Petition

p. 18). In the face of the opinions of counsel (Appendix A to Respondent's Brief in the court of appeals on the *en banc* rehearing—that Brief has been certified to this Court) and the representations made by the *amici curiae*, it is not accurate to say that the existence of potential liability has not been established.

The Government has shown no good cause why the decision of the court of appeals requires judicial review by this Court. Any relief which the Internal Revenue Service desires by way of expanded powers should be sought in the form of legislation and treaties with the affected foreign countries.

CONCLUSION

The Petition for a Writ of Certiorari Should be Denied.

Respectfully submitted,

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May 1964

APPENDIX A

WHITE & CASE
NEW YORK, N Y 10008

May 8, 1964

re United States of America v. First National City Bank
Supreme Court of the United States
October Term 1963, Docket No. 998

First National City Bank
399 Park Avenue
New York, N. Y.

Attention of Mr. William T. Loveland
Assistant Vice President

Dear Sirs:

The undersigned are the attorneys of record for Omar, S.A. in a proceeding pending in the Tax Court of the United States, Docket No. 2041-63. The Tax Court proceeding raises issues as to liability for Federal income taxes claimed in a collection suit filed by the United States in the United States District Court for the Southern District of New York, Docket No. 62 Civ. 3603, in which First National City Bank is one of the defendants. The collection suit is the proceeding in which the United States is petitioning to the United States Supreme Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit. This is the proceeding referred to as the subject of this letter.

The Government's petition for a writ of certiorari states (page 9) that some $2,140,000 of funds belonging to Omar, S.A. may be on deposit in foreign branches of First National City Bank. We are informed by Omar, S.A. that, on May 7, 1964, it remitted to you in New York City from Montevideo, Uruguay, the sum of 2,052.88 U.S. Dollars, with instructions to hold such sum in an account with you in the name of Omar, S.A. Such instructions also state that such sum is to be deemed to have been so held by you at all times on and since October 31, 1962, the date on which the Federal District Court issued its temporary order restraining you

from disposing of any property held by you for the account of Omar, whether located within or without the United States. Omar has further advised us that

a) On October 31, 1962, your branch in Montevideo, Uruguay held for the account of Omar, S.A. 1,900 U.S. Dollars and 1,674.05 Uruguayan Pesos. (The aforesaid sum of 2,052.88 U.S. Dollars which has been remitted by Omar to you is the aggregate of 1,900 U.S. Dollars plus the United States Dollar equivalent of 1,674.05 Uruguayan Pesos computed on the basis of the rate of exchange in effect on October 31, 1962, when the rate was more favorable to the dollar than at present, and includes the balance in the account prior to such remittance.)

b) Neither your branch in Montevideo, Uruguay, nor any other branch of your bank outside the United States has held any other funds or assets for the account of Omar, S.A. on or since October 31, 1962.

In the light of extensive research by us as to the facts of this case, in connection with our representation of Omar, S.A. in the tax controversy involved, we have every reason to believe the above statements are correct.

Very truly yours,

Theodore Tannenwald

Theodore Tannenwald
of Weil, Gotshal & Manges

A. Chauncey Newlin

A. Chauncey Newlin,
of White & Case

Counsel for Omar, S.A.

cc: Hon. Archibald Cox
Solicitor General
Department of Justice
Washington, D.C.

Hon. John F. Davis, Clerk
Supreme Court of the United States
Washington, D.C.